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In the

Supreme Court of the United States

October Term, 1957

No. 476

FRITZ VON OPEL,

Petitioner,

—v.—

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondent apparently agrees (Br. 2) that two questions presented by the petition (Pet. 2-3) and the record are whether petitioner is an "innocent" non-enemy stockholder within the meaning of the *Kaufman* opinion (343 U. S. 156) and whether *res judicata* was correctly applied by the courts below to limit the issues tried upon the remand ordered by this Court in *Uebersee II* (343 U. S. 205). The respondent also discusses (Br. 23-28) the second and fourth questions presented in the petition (Pet. 2-3) concerning whether petitioner was erroneously denied a trial of his property interests and whether the basis of the denial of his claim violated his rights under the First and Fifth Amendments. The respondent also argues that two additional questions presented (Br. 2) are the correctness of the grounds of decision not relied upon by the Court of Appeals but relied upon by the District Court in holding that petitioner was barred from recovery not only as a non-innocent stockholder but also as a statutory enemy who did business in enemy territory or acted as an agent of enemy nationals (Br. 2, 24-27). Petitioner replies briefly to each of respondent's major contentions.

I.

Clarification of the *Kaufman* opinion is needed.

The respondent does not deny petitioner's assertion (Pet. 11) that this is the first reported case applying this Court's *Kaufman* opinion to deny a non-enemy neutral citizen, never resident in or even present in enemy territory during the war, recovery of his aliquot share of vested assets of an enemy tainted neutral corporation. Significantly the respondent does not answer petitioner's arguments based on the language of the *Kaufman* opinion and of the dissenting opinion (Pet. 13), on the text and history of the Act (Pet. 14-15), and on the practical objections of an attempted judicial definition of "innocent" stockholder going beyond the statutory classification of "non-enemy" stockholder. The respondent's principal argument that Kaufman allegedly had a factually "innocent" relationship with the allegedly enemy management of the Swiss Interhandel Corporation whereas petitioner had assertedly a non-innocent relationship with his enemy parents ignores and fails to answer (A) the fundamental legal question whether all neutral citizen non-enemy stockholders, as well as the American citizen Kaufman, are entitled to recover, and (B) the second fundamental question concerning what conduct destroys the "innocence" of a non-enemy stockholder, a question not discussed in *Kaufman* which should be determined by this Court.

(A) *Non-enemy and "innocent" status.*—The respondent's only direct answer to petitioner's legal argument (Pet. 12-17) that under the statutory scheme of the Act and the *Kaufman* decision, all neutral non-enemy stockholders who do not become statutory enemies are legally "innocent" is the brief statement in a footnote (Br. 19, ft. nt. 6) that since only non-enemies may recover under §9(a) of the Act the use of the term "innocent" in the

opinion would have no significance if it did not mean something other than non-enemy. This conclusion, however, is refuted by the express text of the *Kaufman* opinion which discloses affirmatively that "innocent" and non-enemy have the same meaning by the statement that the "rights of innocent stockholders to an interest in the assets" is "based on the Act which enables one not an enemy as defined in §2 to recover any interest, right or title which he has in the vested property" (343 U. S. at 160). Section 9(a) provides that any non-enemy, that is "Any person not an enemy or ally or an enemy claiming any interest" may sue to recover.

Petitioner submits that whatever the final decision of this Court may be it is reasonably clear that the language of the *Kaufman* opinion, and as that language is interpreted in the minority opinion, at least presents a very substantial undetermined question whether citizens of neutral countries, as well as citizens of the United States, who maintain non-enemy status and do not become statutory enemies upon the outbreak of war, declared by Congress within the definitions of §2, are not as a matter of law innocent stockholders. This question should be determined by this Court in this case in the aid of the administration of the Trading with the Enemy Act. Until this question is determined there remains unsettled the questions of the factors, if any, which may make a United States citizen or neutral alien stockholder "non-innocent." Is a distinction to be drawn between United States citizen stockholders and neutral alien stockholders? Is a distinction to be drawn between their conduct, friendly or unfriendly, in respect of the alleged enemy management of the neutral corporation and their conduct unrelated to the neutral corporation in which they are stockholders? Is a distinction to be drawn between conduct after the beginning of the war as contemplated in the Act and prewar conduct or sympathies

referred to and relied upon by the courts below throughout this case? If a stockholder is determined to be "non-innocent" by the application of one or more of any of these criteria is he to be deprived of his share of the vested corporate assets alone although a statutory non-enemy, or is he to be considered as a statutory enemy not entitled under §9(a) to prosecute a claim for vested assets owned by him individually and not through the tainted corporation? The *Kaufman* decision fairly raises but does not answer any of these questions which urgently require determination which, it is submitted, should be made by review in this case rather than by probable protracted litigation in other cases.

B. *Petitioner's alleged "non-innocence."*—Assuming *arguendo* that the *Kaufman* decision permits statutory non-enemies entitled to sue under §9(a) to be barred from recovery as "non-innocent," the respondent's principal argument is that petitioner is not "innocent" because the enemy usufruct in his shares was maintained with his consent prior to the war and through his shares the enemy control was exercised prior to the war (Br. 17-19). The respondent, in support of this argument, points out that one purpose of the 1931 gift to petitioner, not resident in Germany and therefore not subject to its foreign exchange laws, was to obtain United States dollars instead of German reichmarks for the 10% of the Opel shares sold to General Motors Corporation in view of the then uncertain financial situation in Germany. But respondent neglects to refer to the specific finding that the second purpose of the gift was to make financial provision for petitioner who upon the 1928 sale of Adam Opel A.G. to General Motors lost his managerial position in the former family firm (Fdg. 18, R. 63).

The facts that petitioner accepted the gift with the reservation of the parental usufruct which he unsuccessfully

opposed, and that prior to the war petitioner interested himself in the affairs of Uebersee in which he had so large a financial interest, cannot fairly be made the basis for characterizing petitioner as guilty of enmity to the United States or "non-innocence." Surely his interest as a stockholder in Uebersee's litigation to recover its vested assets, or the gold purchased by it in 1933, cannot be condemned as enemy or "non-innocent" activity as respondent argues (Br. 18-19).

The thrust and stress of respondent's argument on this point appears to be that because the enemy usufruct, established in 1935 before the war, provided the means for maintaining an enemy interest in American assets it is not sufficient under the Act to seize and retain that enemy interest but petitioner's separate subordinated interest should also be confiscated as a "non-innocent" or tainted interest (Br. 19). But where, as here, that enemy interest was openly reserved ten years before the war and not even independently established by petitioner the Act does not call for the harsh result of refusal to separate and return the non-enemy interest whether or not it was subordinated to the enemy interest prior to the war.

The respondent's last contention under this point is that any part of the property returned to petitioner would be held by him subject to the German usufruct which could be reasserted by the surviving usufructuary, his mother, and thus a partial return to an enemy would result (Br. 19). This contention is incorrect because the legal basis of the return sought by petitioner is a judicial separation of the vested property into a part to be retained as representing the enemy usufruct and a part to be returned as representing the non-enemy owner's interest in the property. The usufruct which it is claimed was established provided the parents with a usufruct for life and, as the District Court

found (Fdg. 104, R. 84a-85a), the petitioner with a vested remainder. It is this interest which the petitioner asserts should be returned to him. The Act would be satisfied either by a judicial division of the property subject to the usufruct which is within the Court's jurisdiction or by retention of such property and the income therefrom during the life of the surviving usufructuary and return of such corpus to petitioner upon his mother's death.

It is submitted that in the absence of any indication in the *Kaufman* decision as to what conduct of a non-enemy stockholder renders him "non-innocent" the petitioner's interest in a parental gift subject to a parental usufruct should not be accepted as constituting non-innocent conduct without further review by this Court.

II.

Petitioner was denied a trial of the issue of the extent of his property interests not subject to the usufruct.

The respondent (Br. 23-24) does not assert that the District Court on Uebersee's trial made any findings or decision on the issue of petitioner's claimed interest in 20% of the vested property *not subject to the usufruct* (Pet. 21-27). Respondent contends merely that the issue was "fully litigated" on Uebersee's trial (Br. 23) and decided not by the trial court but for the first time by the Court of Appeals upon Uebersee's motion for clarification, rehearing or modification (former R. 2328-2331, reprinted in Appendix, *infra* p. 1a) of the opinion of the Court of Appeals on several issues. The motion stated that this Court might be aided in considering the contemplated petition for certiorari thereafter granted by clarification of the statement in the opinion of the Court of Appeals that the usufruct *in rem* was not only in Uebersee's shares but

also in Uebersee's property consisting of the vested American shares and the dividends therefrom. The motion also sought clarification of the lower court's justification of retention of the valuable remainder interest of the property subject to the usufruct after the death of the aged usufructuary for life. The motion is patently addressed to Uebersee's recovery of this remainder interest of property subject to the usufruct and did not seek a determination of the extent of the interest of petitioner, not then a party to this action, in the property not subject to the usufruct.

Uebersee did not, as respondent contends (Br. 24), in the motion for clarification solicit or place in issue the petitioner's rights in the property free from and not subject to the usufruct. The motion could not seek such a determination because the extent of petitioner's property not subject to the usufruct, a question of fact under Swiss and German law, had not been tried as an issue in the case and no findings were made and no decision had been rendered by the trial court on this issue. The "full litigation" to which the respondent refers was nothing more than general reference to a legal owner's rights in property subject to a usufruct in the course of a long trial on many issues and was not directed to the specific determination of petitioner's interest in 20% of the gift free of the usufruct (Pet. 25). The absence of any findings or decision by the trial court on this issue conclusively supports petitioner's view that this issue was not tried and was not decided in the first trial.

The petitioner cannot be collaterally estopped from obtaining a determination of his interest in the property not subject to the usufruct unless that issue was fairly placed in issue, tried and also decided by the trial court. Although it was not so tried or decided on Uebersee's trial the trial

court on petitioner's trial erroneously held that it was bound and concluded by the former dictum of the Court of Appeals relying on the alleged clarity of the face of the German gift agreement. The petitioner earnestly submits that this denial of a trial of his very valuable (over $1,000,000) asserted interest in the property not subject to the usufruct was a serious error of the courts below and a failure to carry out the mandate of this Court on remand which requires review by this Court.

III.

Res judicata was erroneously applied.

The respondent correctly concedes (Br. 20) that since petitioner's cause of action is admittedly different from Uebersee's the rules of *res judicata* or collateral estoppel apply only to issues previously determined. It is also clear that the issues previously determined which cannot be re-examined are restricted to ultimate legal issues and do not include intermediate evidentiary issues on which ultimate legal determinations are based (Pet. 31). Neither the respondent nor the court below answers petitioner's contention that the issue on Uebersee's trial, whether the enemy usufruct was substantial enough to taint Uebersee, is different from the issue of petitioner's property interest in Uebersee's shares and in the vested assets.

Moreover, the respondent and the court below do not distinguish *Hornstein v. Kramer Bros. Freight Lines*, 133 F. 2d 143 (C. A. 7) (Pet. 31), holding that a stockholder who controlled his corporation's prior action for negligence arising out of an automobile collision was not bound by the adverse judgment against the corporation in the stockholder's subsequent personal action for negligence against the same defendant. The court held that although the cor-

poration had been defeated on the issue of negligence the stockholder was entitled to an independent trial on that issue. It is not a legal absurdity, as respondent suggests (Br. 21), for a different result to be reached in respect of the usufruct so far as petitioner's rights are concerned. Where collateral estoppel does not bar another trial it is entirely appropriate, and often the result, that a different determination is reached on the second trial. The decision below presents a conflict with *Hornstein* which should be settled by this Court.[1]

The petitioner's arguments above that he was erroneously denied a trial of the issue of his property interest apply equally to his contention that he was erroneously denied a determination of that interest under Swiss law, the clearly applicable law in respect of interests in shares of a Swiss corporation at all times located in Switzerland (Pet. 28-29, 32-33). In addition, the District Court's adherence to German law and refusal to apply Swiss law to the wholly new question of the valuation of petitioner's property interests, an issue which respondent does not claim was involved in Uebersee's trial, was clearly erroneous because there had been no prior choice between German and Swiss law on this new issue and no rule of collateral estoppel conceivably could bind petitioner to a choice of German law on this new issue.

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[1] The cases cited by respondent (Br. 20) are distinguishable in that they involve ordinary equitable estoppel of a corporate officer from asserting on his own behalf a claim contradictory to the claim he asserted on behalf of the corporation (the *Davidson* and *Dishinger* cases), a situation not present here where petitioner's claims are consistent, or the different problem of a corporate officer's contempt of an injunction against the corporation (the *Transco* case).

IV.

Petitioner was not a statutory enemy.

The Court of Appeals expressly stated that in view of its determination that petitioner was not an innocent stockholder it was unnecessary to consider the trial court's determination that petitioner was a statutory enemy who did business in Hungary during the war and was an "agent of the enemy and enemy nationals" and therefore enemy tainted (Pet. App. 3a-4a, ft. 5). The respondent, however, argues that there is presented the question of petitioner's ineligibility to recover in this suit on these additional grounds wholly apart from his alleged status as a non-innocent stockholder (Br. 2, 24-27).

A. *Doing business in Hungary.*—The petitioner claimed surprise and objected to respondent's introduction of this new issue into the case when respondent first offered evidence on this issue at the trial (R. 308). The court below reserved its ruling until its opinion after trial (R. 54) but then determined that the issue was within the pretrial and that petitioner was "resident outside the United States" and "doing business within" Hungary within §2(a) of the Act after commencement of war between the United States and Hungary on December 13, 1941.

1. *Pretrial.*—On Uebersee's trial the District Court rejected respondent's contention that Uebersee did business in Hungary (82 F. Supp. at p. 606). The respondent's pretrial memorandum did not challenge the statement in petitioner's pretrial memorandum that petitioner "is *admittedly*, since prior to December 6, 1941, a citizen of Liechtenstein who was not at any time relevant to this action either a resident of, or a person in, enemy territory or enemy occupied territory, or *doing business within such territory* (R. 12, 19, emphasis supplied). It is not strange, therefore,

that petitioner was surprised and not prepared to meet the issue that he was doing business in Hungary after December 13, 1941 even though he was in the United States uninterruptedly at all times after May 1940 (Fdg. 57, R. 72).

2. *Resident outside the United States.*—The trial court found that petitioner was not a resident of the United States (Fdg. 63, R. 73) but did not expressly find that he was "resident outside the United States" and neither in the opinion nor in the findings does the court state where petitioner allegedly was resident outside the United States (Fdgs. 57-63, R. 72-73). A neutral alien such as petitioner, concededly in the United States uninterruptedly from 1940 to 1950, was not resident outside the United States within the meaning of the Act and should not be held to be an alien enemy on this ground without an express finding as to the place where he allegedly did reside outside the United States. If "resident within" enemy territory under the Act means, as it does, more than presence in enemy territory surely "resident outside the United States" in the same sentence of the Act must mean at least presence outside the United States. *Guessefeldt* v. *McGrath*, 342 U. S. 308; *Von Petersdorff* v. *Insurance Company of North America*, 46 N. Y. S. 2d 651 (City Court of New York). It was wholly unprecedented and erroneous to charge petitioner, sojourning (R. 41) or residing in the United States and not outside the United States from 1940 to 1950, with being resident outside the United States for purposes of the Act. See *Commissioner* v. *Patino*, 186 F. 2d 962 (C. A. 4); *Commissioner* v. *Nubar*, 185 F. 2d 584 (C. A. 4).

3. *Doing business within Hungary.*—The holding that petitioner was doing business "within" Hungary after December 13, 1941 is based solely on his renewal in 1939 of some undefined powers of attorney to Transdanubia Bauxite A.G.'s Budapest lawyer to conduct its affairs "on

behalf of Uebersee Finanz-Korporation" (Fdg. 69, R. 74-75). Thus the trial court concluded that although Uebersee was not doing business within Hungary through its wholly owned subsidiary, Transdanubia, nevertheless petitioner, held not to be in control of Uebersee, was so doing business himself although at most merely acting on behalf of Uebersee. The petitioner's clear testimony that he had no business whatsoever of his own in Hungary apart from Transdanubia's business (R. 422) was unchallenged and therefore the trial court included in its finding the qualifying clause that the powers of attorney were "to be performed on behalf of Uebersee Finanz-Korporation". (Fdg. 69, R. 74-75). The petitioner submits that there was no factual basis whatever for the determination that he was doing business within Hungary while he was in the United States during the war.

It is not correct, as respondent argues (Br. 25) that any agency given the Hungarian attorney in 1939 on behalf of Uebersee continued after December 13, 1941. *New York Life Insurance Co.* v. *Davis*, 95 U. S. 425, 429-430; *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij* [1943], A. C. 203. Moreover, there is no evidence or finding that the Hungarian attorney even acted under such powers of attorney after December 13, 1941.

B. *Petitioner was not enemy tainted as an agent of enemy nationals.*—Respondent apparently contends (Br. 26-27) and Part II of the trial court's opinion (R. 44-54) seems to hold petitioner's prewar conduct in respect of his father's business and his change of citizenship not merely make him a non-innocent stockholder but also make him a statutory enemy by extending the doctrine of enemy taint to individuals. Nothing in the text or history of the Act and no precedent supports this startling and extreme view that an individual citizen of a neutral country present in the United States and not present at any time in enemy territory dur-

ing the war can be classified not merely as a non-innocent stockholder in respect of the vested corporate assets but as an enemy for all purposes and barred from recovery of his vested individual assets. The Court of Appeals refused to pass on this point but Judge Fahy from the bench during the oral argument made the illuminating comment that the respondent's argument logically required the respondent to take the position that even if there had never been an enemy usufruct in Uebersee's shares petitioner should be denied any recovery because his prewar conduct, allegedly sympathetic to Germany and hostile to the United States, was sufficient to constitute him an enemy. The respondent, nevertheless, presents as one of the questions for review the issue whether petitioner should be barred because before the war "he acted for and on behalf of, and as an agent of, enemy nationals" (Br. 2). The respondent should not be permitted to assert, as a ground for denial of the petition for certiorari, the validity of this far-reaching and unsupported application of the Act, not passed upon by the court below, and which permits classification of neutral citizens as enemies wholly outside the statutory definition of "enemy."

Moreover, on the facts petitioner cannot be condemned as an enemy because when war commenced in Europe on September 1, 1939 he refused to enter the German armed forces (R. 218) and instead relinquished his German citizenship and lawfully (R. 60-61) acquired Liechtenstein citizenship, as he was certainly entitled to do as far as the United States was concerned whether or not one effect would be to protect his property in the United States from seizure in the event of a future war between Germany and the United States. The concealment or cloaking of an enemy interest was not involved. Nor does such conduct as the episode of petitioner's conversation with the Commercial Attache of the German Consulate in New York City in February 1941, almost a year before the war, upon the alleged request of

his father residing in Germany, constitute any evidence of enemy taint (R. 397-404).

Although the trial court considered at length petitioner's prewar activities it gave no weight to the evidence of petitioner's contributions to the defense effort and the war effort of the United States. Beginning in 1940 he directed the manufacture of aircraft and torpedo parts and participated in other defense work to the full satisfaction of the Office of Production Management (R. 157-161) and obtained a patent on an airplane cowling fastener successfully tested at Wright Field (R. 236). Moreover, he was credited by Military Intelligence authorities with having supplied useful information (R. 184).

CONCLUSION

The courts below decided issues important in the administration of the Trading with the Enemy Act and in conflict with this Court's *Kaufman* decision which merit review on certiorari.

Respectfully submitted,

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October 25, 1957

APPENDIX (Former R. 2328-2331)

IN THE UNITED STATES COURT OF APPEALS

[TITLE OMITTED]

MOTION FOR CLARIFICATION, REHEARING OR MODIFICATION OF JUDGMENT—Filed February 16, 1951

Comes now Appellant and respectfully moves this Honorable Court that it clarify certain matters in its opinion of February 8, 1951 in the above-entitled case or, in the alternative, that it grant a rehearing or a modification of its judgment.

As grounds for this motion, Appellant states that it intends as soon as possible to file a petition for a writ of certiorari in the Supreme Court of the United States. The Supreme Court in a previous decision in this same cause has indicated that the questions raised are of importance and await judicial clarification. (*Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 489-490.) This decision was rendered after reargument ordered by the Court (331 U. S. 870). Appellant believes that it will assist the Supreme Court in acting on the petition for a writ of certiorari if the basis of the affirmance of the lower court set out in the opinion is clarified in the following particulars, which for convenience will be set out as questions:

I

Is it the meaning of the Court that a right in rem (i.e., the usufruct) in shares of a Swiss corporation (Appellant, Uebersee Finanz-Korporation) creates a right in rem in stock of American corporations owned by and held as assets of the Swiss corporation? Does the Court believe that "*ownership*" of a right to dividends on the shares of [fol. 2330] Uebersee, a Swiss corporation, constitutes "*owner-*

ship" of a right to dividends on the shares of the American corporations which Uebersee holds in its treasury?

A reading of the opinion indicates that the Court has answered both the above questions in the affirmative. The opinion states that by an original instrument of gift executed in 1931, Wilhelm von Opel transferred to his son Fritz 600 shares of a German corporation (Adam Opel A.G.). The Court states that this instrument created in Wilhelm von Opel *a right in personam* to demand that a usufruct be established in the German shares or in property taken in exchange for them. The opinion then refers to the Finding (Finding 37, R. 57-58) of the District Court that in 1935 Fritz von Opel established a usufruct in favor of Wilhelm and Marta von Opel by placing all his shares in Uebersee Finanz-Korporation (the appellant here) in a safe deposit box in Zurich and delivering the key to one Frankenberg, their agent for that purpose. Then the Court concludes without setting forth its reasons that this usufruct in stock of Uebersee was a "right in rem" and "ownership of the right to dividends" in the stock of the *American corporations,* which were the principal assets of Uebersee.

While this seems to be the ruling of the Court, Appellant is not entirely certain such an interpretation of the opinion is correct for two reasons: (1) It has not heretofore been held in corporation law that a right in rem to shares of a corporation constitutes a right in rem or indeed any direct interest in the assets of the corporation; (2) Since the opinion does not discuss this point, it may be that the Court was under the impression that the District Court had found there had been a delivery of possession and a resulting usufruct in the shares of the American corporations which were seized by the Custodian.

The lower court approved confiscation and retention of the American shares, not on the ground that the enemy had any direct right in them, but because of alleged enemy

taint of the Swiss corporation which owned them. This Court rejects enemy "taint" as a basis for its decision and seems to rely on enemy "ownership of the right to dividends" in the American shares. Clarification of the reasoning by which the Court concluded that there was an enemy-owned right in rem in the American shares and that enemy taint as found by the District Court is unimportant would assist the Supreme Court in determining the question raised on certiorari.

II

Assuming the Court believes that there is a usufructuary right in rem in the American shares for 80% of the dividends during the life of Wilhelm and Marta von Opel, the following question arises:

Is it the meaning of the opinion that a life interest in 80% of the dividends on the stock of the American corporations, which the Court found to exist in the enemy, is a ground which justifies the Custodian retaining and confiscating the remaining interest of Fritz von Opel, a neutral?

It is, of course, Appellant's view that the stock in the American corporations was owned by Uebersee and that stockholders of Uebersee have no legal right to it any more than the stockholders of an American corporation have a legal right to its assets. If, however, the Court is correct in holding that the usufruct in the shares of Uebersee creates an equivalent right in rem in Uebersee's American assets, the opinion does not explain why it permits the Alien Property Custodian to retain more than that right which it finds the enemy "owns." The remaining interest in the stock after the death of the enemy, confiscated in this case, is extremely valuable because the enemy Marta von Opel is over 75 years old.

The lower court approved confiscation and retention of the whole property because of its conception of "enemy

taint." But the opinion of this Court does not appear to rest on this ground. Appellant believes that the Supreme Court will be aided in determining the character and importance of the questions presented if the basis for confiscation of a substantial and important interest in the shares owned by a neutral is clarified.

III

In the event the Court did not intend to hold that the Alien Property Custodian can retain absolute ownership in the American assets of Uebersee, because of Fritz von Opel's remaining interest in the shares of Uebersee, Appellant respectfully petitions for a modification of the Court's judgment. In that event, Appellant requests that the District Court be ordered to modify its judgment so as to award to Uebersee the interest in the shares of the American corporations other than the usufruct.

Wherefore, Appellant respectfully moves this Honorable Court that it clarify its opinion of February 8, 1951, in the above-entitled case, or, in the alternative, that it grant a rehearing or a modification of its judgment.

Respectfully submitted,

ARNOLD, FORTAS & PORTER, ETC.